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JUDICIAL CENTRALIZATION.

Mr. Justice Brewer, in a recent address, says regarding legislative centralization:—"Local self-control is giving way before the pressure for centralized power. The town meeting is supplanted by the state legislature, while the latter in its turn is yielding to the expanding power of Congress. Political parties are largely under the management of bosses, and the whole great forces of industry, business and politics seem passing under the dominance of single central control. Is this centralizing tendency antagonistic or helpful to the Republic? Is it consistent with popular government? Apparently it is antagonistic; against the Republican thought of equality of right; each man a ruler and equally sharing the responsibilities and powers of government. * * * * You cannot stay this movement towards consolidation and centralization. It is a natural evolution."

Judge Brewer's address suggests the inquiry whether this movement towards centralization has extended to the Judicial Department of the government also.

The judicial reports furnish evidence that centralization is further advanced in the judicial than in the legislative department; that not only are judicial powers being centralized in the Federal courts by being withdrawn from the State courts, but also that these centralized powers are being centered in the Federal judges by being withdrawn from the juries.

I. Two of the amendments added to the Constitution of the United States soon after its adoption were intended to better secure the right of trial by jury, both in criminal and civil cases.

Violation of that right in a criminal case constituted one of the charges upon which an associate justice of the Supreme Court of the United States was impeached in 1804. The articles of impeachment charged that Mr. Justice Chase:—

"Did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust * * * in debarring the prisoner from his constitutional privilege of addressing the jury

(through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine the question of law, as well as the question of fact, involved in the verdict which they were required to give. * * * In consequence of which irregular conduct, as dangerous to our liberties as it is novel to our laws and usages, the said John Fries was deprived of the right secured to him by the eighth article amendatory of the Constitution, and was condemned to death without having been heard by counsel in his defence, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately rest the liberty and safety of the American people."

To that charge, the venerable and learned judge pleaded not guilty; and, in his answer, admitted that "the jury had a right to determine the law as well as the fact," and declared, "this power he holds to be a sacred part of our legal privileges, which he never has attempted, and never will attempt, to abridge or obstruct." *Annals of Congress, 1804-1805, pp. 86-115.* Upon that plea, Judge Chase was tried and acquitted.

Notwithstanding this concurrence of opinion in 1804, that it was the "indisputable right" of the jury under the Constitution to determine the law as well as the fact in criminal cases, and that it constituted a high crime and misdemeanor in a judge to attempt to wrest that right from them, it was declared by the Supreme Court of the United States in 1894, that, "In the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law, upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be." 156 U. S. 51.

Mr. Justice Gray, with whom concurred Mr. Justice Shiras, dissented, and said:—"Until nearly forty years after the adoption of the Constitution of the United States, not a single decision of the highest court of any State, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and conscience, the law involved in that issue—except the two or three cases, above mentioned, concerning the constitutionality of

a statute. * * * The question what are the rights, in this respect, of persons accused of crime, and of juries summoned and empaneled to try them, under the Constitution of the United States, is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature, but what, in the light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument. * * * As the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield—from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law—of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies.”

The effect of that decision is not only to withdraw from the jury to the court the right to determine the law in criminal cases, but also to make the court the final judge of its own powers, and to withdraw from those upon whom the Constitution has conferred “the sole power of impeachment,” and “the sole power to try all impeachments” to the judicial department the power to determine what constitutes an impeachable offence in a judge.

As it is only in the High Court of Impeachment that judges can be called to give an account of the manner in which they have discharged their official duties, the judicial department, no more than the legislative or executive departments, could by mere force of its own decision, finally determine the limitations upon its own powers, without putting it into the power of every judge to exempt himself from all responsibility to his country for his official acts, by merely pleading, in justification, that he, as the court, had decided that he, as the judge, had a lawful right to do the act which the House of Representatives, acting as the Grand Inquest of the nation, had presented as a high crime and misdemeanor in the High Court of Impeachment, the highest tribunal of the nation.

II. By overruling its prior decisions, the Supreme Court has vastly enlarged the admiralty jurisdiction of the Federal courts.

To secure the right of trial by jury under the law of the land against the encroachments of the admiralty courts, it was declared by an Act of Parliament, in 1389, that the admiralty must “not meddle henceforth of anything done within the realm, but only of a thing

done upon the sea." Two years after, to remove any doubts as to what was meant by the realm and the sea, came another Act of Parliament ordering that of "things done within the bodies of countries, by land or water, the admirals shall have no cognizance, but they shall be tried by the law of the land."

In 1768, John Adams prepared for the citizens of Boston instructions to their representatives in which it was said "that next to the revenue itself the late extensions of the jurisdiction of the admiralty are our greatest grievance. The American courts of admiralty seem to be forming by degrees into a system that is to overrun our Constitution and to deprive us of our best inheritance, the laws of the land." And the American colonies, in their address to the King, complained that "the powers of the admiralty and vice-admiralty courts are extended beyond their ancient limits; whereby our property is taken from us without our consent."

For more than fifty years after the adoption of the Constitution, it was uniformly held by the Supreme Court that the constitutional grant of admiralty jurisdiction to the Federal judiciary was limited by what were cases of admiralty jurisdiction in England, when the Constitution was adopted. During all that period, the established doctrine in England that the admiralty jurisdiction was limited to tide water, and did not extend into the body of a county, although the tide might ebb and flow there, was recognized by the Supreme Court as furnishing the test for determining the general admiralty jurisdiction of the Federal courts. 10 Wheat. 428 (1825); 7 Pet. 324; 11 Pet. 175; 12 Pet. 76 (1838).

But in 1847, the Court concluded that "the grant of admiralty powers to the courts of the United States was not intended to be limited by what were cases of admiralty jurisdiction in England when the Constitution was adopted;" discovered "a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than in the designation of it by the common law courts in England;" and held that "the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that be *infra corpus comitatus*." 5 How. 441. Ten years later, the Court held that the general admiralty jurisdiction extended into the body of a county, although there was no tide there. 20 How. 296. And it is now held generally that the general admiralty jurisdiction extends over all navigable waters throughout the Union, whether with or without tide, and whether within or without the body of a county.

The effect of this enlargement of jurisdiction is:—(1), the abolition of the trial by jury over large tracts of country; (2), the substitution there of the civil law and its forms for the common law and the statutes of the States; and, (3), the encroachment on the jurisdiction of the tribunals of the State over disputes happening between its own citizens. 5 How. 441; 20 How. 296.

III. Notwithstanding the constitutional guarantee of trial by jury in suits at common law, probably no lawyer could now be found, either upon the bench, or at the bar, who would, upon consideration, deny that the equity jurisdiction of the Federal courts has silently encroached upon the common law jurisdiction of those courts, and substituted trial by the chancellor under the principles of equity, as administered by the Federal courts, for trial by jury under the law and statutes of the states; or that the extraordinary remedies of equity have become ordinary remedies.

Mr. Justice Miller has called attention, in a dissenting opinion, to one phase of this encroachment:—"The creation of receiverships by courts of chancery, the powers conferred on the receivers, and the duration of their office, has made a progress which, since it is wholly the work of courts and not of legislatures, may well suggest a pause for consideration. Of the many thousand miles of railway in my judicial circuit, and of the fifty or more corporations who own or have owned them, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the road, collect its means and pay its debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He, generally, takes the road and all its appurtenances out of the hands of the company which is its owner; operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and superior lien on the property pledged to them. All this time the receiver, in the use of the company's road and rolling stock, is performing the function of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform. The decision which has just been announced declares that for these failures he cannot be sued in a court of law. * * * The right

of trial by jury, which has been regarded as secured to every man by the Constitutions of the States and of the United States, is denied to the person injured, and he is compelled, though his cause be one with no element of equitable jurisdiction in it, to submit it to a court of chancery or to one of the masters of such a court." 104 U. S. 126.

IV. But it is on the law side of the Federal courts, that the strongest evidence is found of their expanding powers. The contest there was not one for jurisdiction between common law, equity and admiralty courts, or between Federal and State courts. There it was the last struggle for the preservation of the right of local self-government, a futile effort to beat back the encroachments of what has come to be known as "general law," and the "common law of the United States," upon the common law of the several States.

The question as to the existence of a common law of the United States seems to have been particularly noticed for the first time judicially by Mr. Justice Chase, on the circuit, in 1798. He said:—"In my opinion, the United States, as a Federal government, have no common law. If, indeed, the United States can be supposed for a moment, to have a common law, it must, I presume, be that of England; and, yet, it is impossible to trace when, or how, the system was adopted, or introduced. * * * The United States must possess the common law themselves before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England; the Constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?" 2 Dall. 384.

In 1834 and in 1850 the Supreme Court declared:—"It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated." 8 Pet. 658; 2 Pet. 144.

"The common law, in all its diversities, has not been adopted by any one of the States. In some of them it has been modified by statutes, in others by usage. And, from this it appears that what may be the common law of one State is not necessarily the common law of any other. We must ascertain the common law of each State by its general policy, the usages sanctioned by its courts, and its statutes." 9 How. 78.

That constitutional principle and rule of decision was laid down without limitation, qualification or exception; but, except as to real estate, the rule has been virtually abrogated by gradually grafting upon it limitations, qualifications and exceptions.

Formerly the rule was applied in determining the rights and liabilities of parties to bills of exchange and promissory notes, the class of cases first withdrawn from its operation.

"The Constitution declares that no State shall impair the obligations of a contract, and there is no other limitation on State power in regard to contracts. In determining on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactment of the different States. These laws in various form and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages, under the law of the State where the indorsement was made. Every indorsement on a bill is a new contract, governed by the local law." 8 How. 82; 1 Cr. 181; 1 Cr. 291; 3 Cr. 312; 5 Cr. 49; 5 Cr. 142; 5 Cr. 322; 6 Cr. 204; 9 Wheat. 581; 2 Pet. 331; 4 Pet. 366; 4 How. 326.

Subsequently the court laid down and applied the rule of decision thus:—"The questions under our consideration are questions of general commercial law. * * * Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court." 16 Pet. 511 (1842).

"Where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions." 2 Black, 418 (1862).

"The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries by the negligence of the former. This is not a question of local law to be determined by an examination of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law to be determined by a reference to all the authorities, and a consideration of the principles underlying the relation of master and servant. * * * It is a question in which the nation as a whole is interested." 149 U. S. 370, (1892).

In order to prove the existence of a body of "general law," Mr. Justice Brewer, who delivered the opinion of the Court, cited many cases upon many subjects, all of comparatively recent date, which had been decided by the Supreme Court under the "general law," in direct opposition to the law of the State in which the cause of action arose, and the case was tried, as that law had been declared by the courts of that State.

Mr. Justice Field dissented, and said:—"Is the Federal judicial department to force upon these States views of the common law which their courts and people have repudiated? I cannot assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the Federal judges are the special possessors and guardians, to be applied by them to control judicial decisions of the State courts, whenever they are in conflict with what those judges consider ought to be law. The present case presents some singular facts. The verdict and the judgment of the court below were in conformity with the law of Ohio, in which State the cause of action arose and the case was tried, and this court reverses the judgment because rendered in accordance with that law, and holds it to have been error that it was not rendered according to some other law than that of Ohio, which it terms the general law of the country. This court thus assumes the right to disregard what the judicial authorities of that State declare to be its law, and to enforce upon the State some other conclusion as law which it has never accepted as such, but always repudiated. * * * I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial

opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating these doctrines as a convenient mode of brushing aside the law of a State in conflict with their views. * * * But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.

And according to Mr. Justice Miller, there was a like change in regard to the binding force in the Supreme Court of the decisions of State courts upon the construction of State constitutions and State statutes:—"I think I have sustained by this examination of the cases, the assertion made in the commencement of this opinion that the court has, in this case, taken a step in advance of anything theretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the State courts, to decide as a finality upon the construction of State constitutions and State statutes. This invasion is made in a case where there is no pretense that the Constitution, as thus construed, is any infraction of the laws or Constitution of the United States." 1 Wall. 175.

"It is an entire and unqualified overthrow of the rule imposed by Congress and uniformly acted on by this court up to the year 1863, that the decisions of the State courts must govern this court in the construction of State statutes." 8 Wall. 575.

In its last utterance on the subject of a common law of the United States, the court referred to a collection of extracts from its opinion as "all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the rules and principles by which all transactions are controlled, except so far as those rights and principles are set aside by express statute." 181 U. S. 163 (1901).

As the court enlarged the admiralty jurisdiction by the adoption of the "general" admiralty law, so it has enlarged, or created, other powers by adopting the "general law."

The court has overthrown in fact what it had previously established in principle. During the first half-century of its organization there was no constitutional principle more firmly established

by its decision than that "there can be no common law of the United States;" "there is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union;" "we must ascertain the common law of each State by its general policy, the usages sanctioned by its courts and its statutes." Without controverting or refuting the correctness of that principle, the court has ejected, subject by subject, the common law of the several states from the Federal tribunals, and substituted the "general law." Thus has the Supreme Court come to be the real maker of the laws administered in the Federal tribunals, even in determining rights which, admittedly, are not, under the Constitution, subject to regulation by the legislative, much less the judicial, department of the Federal Government.

Marshall, when a representative in Congress, declared that "it was the duty of each department to resist the encroachments of the others," and expressed the apprehension that "the other departments would be swallowed up by the judiciary." While Chief Justice he asked concerning the Constitution:—"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation." 1 Cr. 176.

Across the intervening years, the answer is echoed back by Mr. Justice Gray:—"As the experience of history shows it cannot be assumed that judges will always be free from the inclination, to which even the most upright and learned magistrates have been known to yield—from the most patriotic motives and with the most honest intent to promote symmetry and accuracy in the law—of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies." 156 U. S. 176.

These are some of the evidences to be found in the reports of that centralization which is transforming this Government from one of laws into one of men. Whether that change be approved, or disapproved, or accepted as "natural evolution," the manner in which the change has been wrought is a symptom of waning respect for law, and especially for what was formerly declared by the court of last resort to be the fundamental principles upon which this Government was founded.